88-1689

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JAMES COVINGTON,

Petitioner,

v.

HAROLD SAPPINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

MARK C. MEIERING
RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. The New Mexico courts have refused to apply ERISA preemption to a common law negligence claim against an insurance agent even though the allegations entirely stem from nonpayment of benefits by an ERISA plan; may state courts disregard the Congressional intent to provide an exclusive means for making claims for nonpayment by an employee welfare benefits plan?

2. May state courts modify the statutory definitions (29 U.S.C. §§ 1002, 1003) of an ERISA-regulated employee welfare benefit plan subject to federal preemption?

   a. May state courts graft to the statutory definition a requirement that an ERISA plan must be backed by an insurance policy before the state court must recognize that claims involving employee welfare benefit plans are governed solely by the federal statutory scheme?

   b. May a state court restrict the reach of ERISA regulation by interpreting the federal statute to apply only to "solvent" plans, even though Congress put no such restriction in the statute?

3. May state courts circumvent Congress' intent to establish ERISA remedies as the exclusive vehicle for an employee's claims involving employee welfare benefit plans by carving out a parallel state law cause of action for failure of a plan to pay benefits? That is, may a state court provide the employee with an alternative to suit under 29 U.S.C. § 1132(a)?

QUESTIONS PRESENTED–Continued

4. When a state court is called upon to determine whether a plaintiff's state suit is related to an ERISA-regulated employee welfare benefits plan, is it pertinent to decide the issue based on the rubric "if the plan will have to pay the judgment, the suit relates to a plan, but if someone else may be liable for a judgment, then the suit does not relate to a plan."

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Petitioner James Covington petitions the United States Supreme Court for a Writ of Certiorari to review the final order of the Supreme Court of New Mexico (which affirmed the earlier opinion of the Court of Appeals of New Mexico) entered January 10, 1989.

OPINIONS BELOW

The order and the opinion are not reported as of this date. The opinion of the Court of Appeals of New Mexico is at Appendix IA. The order of the Supreme Court of New Mexico denying review of that opinion is at Appendix II.

JURISDICTION

This Petition is docketed in this Court within 90 days of the final judgment below. 28 U.S.C. § 2101(c). Jurisdiction is invoked under 28 U.S.C. § 1257(a) (1982), *as amended by* Act of June 27, 1988, Pub. L. No. 100-352, § 3, 1988 U. S. Code Cong. & Admin. News (102 Stat.) 662. The decisions of the New Mexico courts draw in question the validity of a statute of the United States and in particular its preemption of state common law remedies.

UNITED STATES STATUTES

This Petition involves an employee welfare benefit plan as defined by the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. § 1001 *et seq.* The

preemption provision found at 29 U.S.C. § 1144(a) provides that state law causes of action are superseded by the federal statutory scheme. 29 U.S.C. § 1132 provides the plan participant/employee with federal remedies to enforce plan rights and payment of plan benefits. This Petition seeks review of the New Mexico appellate opinion and order which established a rule in New Mexico permitting a dissatisfied plan participant to ignore ERISA and to choose an alternative common law remedy for nonpayment of plan benefits.

STATEMENT OF THE CASE

Plaintiff-Respondent Sappington filed suit expressly alleging that his employer Levy Auto Supply purchased a health care plan (Mark I Benefits) for the employees, that Respondent participated, but that the plan failed to reimburse him for his hospital expenses. Respondent chose not to exercise his rights under 29 U.S.C. § 1132 by suing the plan or the employer or the plan fiduciary and administrators. Respondent instead sued Defendant-Petitioner Covington and another man in a common law negligence action purportedly because they had introduced the Mark I Benefits plan to the Respondent's employer without checking on the plan's financial strength. Respondent alleged that he was entitled to, but did not receive payments from the Mark I Benefits plan as reimbursement for hospital expenses covered by that plan. Respondent alleged that he did not get plan benefits to which he was entitled because Petitioner-Defendant Covington was negligent in investigating the financial

status of Mark I Benefits as an employee welfare benefits plan.

Mr. Covington moved for dismissal, or in the alternative, for summary judgment on the basis of federal preemption. Mr. Covington contended that when Congress passed the Employee Retirement Income Security Act of 1974 (ERISA), that statute was intended to provide for complete control over employee benefit plans, including the employee's means for enforcing rights to payments under employee welfare benefits plans.

The facts necessary for reaching the legal issue presented by Mr. Covington's motion were established by the Respondent's Answers to Request for Admissions and by several material, well-pleaded facts contained in the Respondent's Complaint. That record was not in dispute before the New Mexico courts and shows: Respondent participated in an employee welfare benefits plan known as Mark I Benefits provided by his employer, Levy Auto Supply. He claimed that the plan became financially insolvent and that he was not reimbursed for some of his hospital expenses. However, he made no attempt to make a claim upon the plan or its assets in any insolvency proceedings; nor did he in any other form attempt to make a claim or file suit under 29 U.S.C. § 1132(a). Respondent never has contended that his suit against Mr. Covington was intended to assert or make use of his federal ERISA remedy for nonpayment of plan benefits.

Respondent's Complaint did not contend (and no evidence suggested) that Petitioner Covington was an officer of the plan, a plan administrator, or a fiduciary

within the meaning of ERISA. Nor did Respondent contend that Petitioner controlled the plan assets or held any official position with Mark I Benefits whereby he could influence payment of benefits. Respondent did not allege that Mr. Covington did anything to cause the nonpayment or to improperly manage the plan assets – the gist of the Complaint alleged that Mr. Covington's role was confined to supplying Levy Auto with information on how to go about putting in place the Mark I Benefits plan to pay medical and hospital expenses for Levy Auto employees. Respondent admitted that he never had any conversations or direct dealings with Mr. Covington.

Respondent made no claim that Mr. Covington or the other Defendant made any extra-plan personal promises to pay Respondent or that Mr. Covington made any individual commitment to Respondent independent of the plan. Respondent simply and explicitly alleged that since the Mark I Benefits plan did not reimburse him for his medical expenses, Mr. Covington should do so because allegedly Mr. Covington was negligent in not investigating Mark I Benefits financing at the point when Levy selected Mark I Benefits for the Levy employee benefits plan. In particular, Respondent sought to enforce against Petitioner Covington his right to reimbursement for specific hospital expenses purportedly covered by the plan but which apparently went unpaid by the plan fiduciary.

The New Mexico District Court denied the motion by merely stating that the Respondent's negligence claim is not preempted; then the district court certified its ruling (there were no New Mexico opinions on ERISA) for an interlocutory appeal to the New Mexico Court of Appeals. That court affirmed with an opinion. Appendix

IA. To date, that opinion is the sole opinion on ERISA preemption reported by a New Mexico court. Mr. Covington petitioned the New Mexico Supreme Court to issue a writ of certiorari to the Court of Appeals. Appendix IB. The New Mexico Supreme Court refused to review the matter by order entered January 10, 1989, Appendix II. The underlying Complaint and Plaintiff's Answers to Requests for Admissions are Appendix III and IV.

REASONS FOR GRANTING THE WRIT

I. THE NEW MEXICO APPELLATE COURTS' PRECEDENT CREATES AN EXCEPTION TO THE ERISA REMEDIES WHICH EVISCERATES THE EFFORT TO ESTABLISH A COMPREHENSIVE NATIONAL REGULATORY/ENFORCEMENT SCHEME FOR EMPLOYEE WELFARE BENEFITS PLANS.

The questions presented are substantial. If other states' Supreme Courts follow the guidance of the New Mexico appellate opinion, the comprehensive and exclusive remedies provided by ERISA will be a meaningless fiction. State courthouses will offer to a dissatisfied benefit plan claimant a common law negligence adjunct or alternative which will bypass and ultimately defeat the congressional intent for a national standard for regulating employee benefit plans and employees' claims against those plans.

The New Mexico decision relies on several distinctions to find a rationale for exempting from ERISA preemption this employee's claim for benefit plan entitlements. The first distinction is that the Mark I Benefits plan in question was allegedly insolvent. Thus, even

though acknowledging that Mark I Benefits is an employee welfare benefit plan as defined by ERISA, the New Mexico decision fixed on the notion that the plan had not "ripened." In other words, the court decided that if the plan was not supported by a "valid insurance policy," then it was not a "viable" plan or an ERISA plan. Therefore, the court could construe the suit to be outside ERISA's reach: "We do not believe that Congress intended federal preemption under ERISA to apply where the basis of plaintiff's claim is an alleged negligent failure to provide a valid insurance policy." Opinion, p. 5. This reasoning is contrary to the explicit declaration in § 1002(1) which states that plans that provide hospital benefits "through the purchase of insurance or otherwise" are within the meaning of an ERISA plan.

Of course, Section 1003, the statutory provision which sets forth the coverage of ERISA regulation, does not in any way justify the holding that the alleged financial backing for the plan with a valid insurance policy determines whether a plan is subject to ERISA. Section 1002(1) explicitly states otherwise, and the New Mexico court's rationale flies in the face of the fact that one of the obvious reasons for national regulation through ERISA was to exert federal controls over the quality and performance of employee welfare benefit plans – § 1109 provides for liability for a fiduciary who breaches a duty to properly manage plan assets. Clearly, Congress would not have enacted so many provisions on fiduciary responsibility if it had no intention of establishing an exclusive scheme for regulation of a plan's financial integrity. It makes no sense for the New Mexico Court of Appeals to interpret congressional intent in the way construed

because when Congress chose to regulate employee benefit plans on a national scale, why would it exempt underfinanced plans when those are the ones most likely to engender claim payment and related problems? The ERISA definition of a regulated plan simply does not in any way turn on whether it is supported by insurance or by a valid policy or whether it has "ripened" or is financially solvent. *See Pane v. RCA Corp.*, 667 F. Supp. 168 (D.N.J. 1987).

The effect of the New Mexico holding is that any dissatisfied plan claimant can ignore ERISA merely by alleging that the plan's assets are insufficient. Such an allegation would now in New Mexico erase the Federal supremacy of ERISA and permit the plan claimant to avoid ERISA even though one of the major regulatory features of the legislation is to hold plans, trustees and administrators responsible for not paying employees' rightful claims. The plan itself could even avoid ERISA regulation in New Mexico by intentionally undercollateralizing or not underwriting for claims and then contending it was not within the New Mexico definition of an ERISA plan. Could a New Mexico plan not be ERISA-regulated at the option of a suing plan participant, but simultaneously be subject to ERISA regulation when the Secretary sues under the next provision of § 1132(a)(2)? New Mexico has strained logic to reach an inappropriate construction of Congress' intent and by doing so has brought about the very inconsistency § 1144 sought to eliminate.

The New Mexico Court of Appeals' opinion selected another suspect distinction to hold that this suit was not

related to an ERISA plan and hence not subject to ERISA preemption. That distinction is found at page 6:

> The alleged negligent conduct of defendant [not investigating Mark I benefit plan's financial soundness] took place before the employee benefit plan was ever acquired or took effect. . . . We do not construe the provisions of ERISA to preempt plaintiff's claim of negligence grounded upon alleged acts or omissions preceding the institution of a benefit plan.

This ignores the statutory language which repeatedly refers to the intent to control the establishment of ERISA plans. Section 1001(a), where Congress expressed its declaration of policy, states an intent that "safeguards be provided with respect to the establishment, operation, and administration of such plans." There simply is no warrant for the New Mexico Court of Appeals holding that this suit is not preempted by ERISA because of nothing more than an artificial temporal distinction. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), points out that ERISA contains fiduciary standards to address self-dealing, imprudent investing and misappropriation of plan funds. Plainly, ERISA was intended to provide a remedy for and to regulate in the area of a plan's financial solvency regardless of whether the issue arises in connection with the establishment, operation or administration of the plan. The New Mexico court's search for a way around ERISA on this basis is simply contrary to the statute.

The other novel distinction employed by the New Mexico court is the notion that ERISA can be avoided by referring to the status of the defendant rather than looking to the substance of the claim and cause of action. That

is, the court observes that Mr. Covington is an insurance agent and his tie to the ERISA plan is that he introduced the employer to Mark I Benefits plan. Here again, the court bootstraps the conclusion that an ERISA plan is not really a plan if not "ripened" by a "valid" insurance policy. From this, the court opines that ERISA does not attempt to set standards for insurance agents when establishing a plan through the purchase or sale of insurance that "never in fact ripen into an ERISA-regulated employee benefit plan." In short, the court freely interprets *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), as stating that if the employee claimant sues an insurance agent for establishing an unsatisfactory plan, ERISA does not preempt the action even though the heart and soul of the claimant's suit is to recover for unpaid plan benefits.

Again, the effect is that a claimant can neutralize and shelve ERISA merely by characterizing the defendant as a person not regulated by name in specific provisions of the statute, ergo a person for whom there are no standards or rules of conduct in ERISA. This then, in New Mexico, provides the vehicle to transcend ERISA: If ERISA does not explicitly set standards for the named defendant's occupation, then ERISA was not intended to regulate the subject matter, and therefore, any suit between those parties is not ERISA-related. This ignores the fact that nonpayment to plan participants is the reason and basis for the suit and ignores the ERISA provision that specifies § 1132(a) as the employee's method for enforcing payments. Of course, ERISA preemption can easily be defeated by such semantics if one is willing to pretend that there is no ERISA-regulated plan and further

characterize the defendant as well as the allegations against him as falling outside Congress' regulatory purpose.

It is worth noting that in the course of discussing the nature of the allegations made by this plaintiff against this defendant, the New Mexico court cites two New Mexico cases which recognize the type of common law negligence action asserted in the complaint. The court's own citations show that this plaintiff's cause of action is not a state law specifically directed toward regulating insurance *Cf.* 29 U.S.C. § 1144(b)(2)(A). By citing the New Mexico case allowing suit for an appraiser's negligence, the opinion gives silent witness to the fact that we are not here concerned with a state law which pertains strictly to insurance regulation. This plaintiff's complaint of failure to investigate the solvency of a plan might be made against a stockbroker, accountant, financial consultant, attorney, appraiser or actuary. Hence, under this Court's analysis in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the underlying suit cannot be construed to fall within the § 1144(b)(2)(A) exception to preemption.

II. THE NEW MEXICO RULE IS AT ODDS WITH THIS COURT'S DECISIONS AS WELL AS THOSE OF THE UNITED STATES CIRCUIT COURTS AND UNITED STATES DISTRICT COURTS.

The federal courts have applied ERISA preemption in numerous cases involving claims against insurance companies and brokers. There are cases involving allegations of fraud and misrepresentation in connection with inadequately funded plans. None of those cases encourage,

much less are precedent for a corollary to preemption along the lines that if suit is against an insurance agent, ERISA was not intended to apply or that if the plan's assets are not "viable," ERISA does not apply.

The United States Supreme Court's decisions turn on whether the suit is related to an employee welfare benefits plan, and "related to" is broadly interpreted. This Court has applied preemption to state common law actions which seek to enforce a right related to a plan. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). Mr. Sappington's suit against Mr. Covington relates to an ERISA plan for obvious reasons. Mr. Sappington would not be suing had his hospital expenses been reimbursed by Mark I Benefits; this suit shifts the plan's liability to Mr. Covington and excuses the plan from paying. The adversaries' tie to each other exists solely because of a plan which meets ERISA's definition. The state law cause of action meets none of the *Pilot Life* criteria for an exception to preemption. It is perplexing how New Mexico's courts could hold that the instant suit does not relate to an ERISA plan.

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985) noted the clearly expressed intent of Congress to design a national statutory scheme to prevent past abuses of plans by plan fiduciaries, including misuse and mismanagement of plan assets. *Id.* at 140 n.8. The Court quoted from the *Congressional Record* to make the point that ERISA would control asset manipulation and create an exclusive scheme for oversight. Yet, New Mexico seeks to reserve an alternative or option to the ERISA remedies against those who cause a plan's insolvency.

New Mexico courts, by illusory distinctions, reserve the right to regulate a plan's adequacy or sufficiency by permitting a common law negligence suit against persons such as Mr. Covington who had no control over Mark I Benefits asset management, investment dealings or claims decisions. This is contrary to the decisions which hold that the only proper remedy for non-payment is an ERISA suit against those who control the plan and make the decisions. *See Daniel v. Eaton Corp.*, 839 F.2d 263 (6th Cir. 1988). Although the New Mexico Court of Appeals ultimately allows this negligence suit based on allegations that the plan was not adequately funded to pay benefits to the plaintiffs, this holding is not supported by its citation to *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987).

Federal decisions have held expressly that ERISA preempts common law claims against insurance companies and insurance brokers. *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 (11th Cir. 1987).

Federal decisions have not countenanced common law claims merely because the claimant alleges that the plan's assets are inadequate or that the defendant is responsible for the inadequacy of the plan assets. *Mid America Hotel Corp. v. Bernstein*, 664 F. Supp. 384 (N.D. Ill. 1987).

The New Mexico Court of Appeals' search for distinctions is very similar to the approach rejected in *Comprehensive Care Corp. v. Doughtry*, 682 F. Supp. 516 (S.D. Fla. 1988). In that case, the court was told that there was no conflict with ERISA because there was no claim seeking recovery of benefits from the plan, and that the suit

was not against a plan but on a collateral agreement outside the scope of ERISA. These arguments did not overcome the obvious fact that the suit would not exist but for the plaintiff's failure to obtain payment of benefits which the plaintiff thought should have been paid by an ERISA plan. In the present case, all the artificial distinctions aside, this plaintiff is suing Mr. Covington as a result of the nonpayment of benefits by Mark I Benefits. The federal statute and cases do not support the artificial distinctions New Mexico has now approved as the route around ERISA preemption.

III. IF THE NEW MEXICO DECISION IS FOLLOWED IN OTHER STATES BECAUSE THIS COURT REJECTS REVIEW, THE WAY WILL BE CLEAR FOR LITIGANTS TO ESCHEW THE CONGRESSIONAL REMEDY FOR DISPUTES OVER PLAN BENEFITS AND CHOOSE AN ALTERNATIVE PROVIDED BY STATE COURTS REGARDLESS OF WHAT THIS COURT HAS RULED IN PRIOR CASES.

This Respondent's suit seeks recovery of unpaid plan benefits from Mr. Covington – there can be no genuine argument as to this suit's direct relation to an ERISA plan. This Respondent's alleged grounds for his claim fall squarely within the words of 29 U.S.C. § 1132(a)(1) although he chooses not to sue Mark I Benefits or the plan principals. By refusing to acknowledge this, the New Mexico courts make the crack and provide the wedge for all litigants to shatter the federal preemption provision and destroy the underlying goal of uniform comprehensive regulation of employee benefit plans through ERISA. That is, this suit very directly permits state law to dictate

and control the consequences of a plan's failure to adequately underwrite its obligations or its failure to properly manage assets and pay claims. This undermines the purpose of ERISA and is contrary to this Court's statement in *Pilot Life* that varying state causes of action for resolving claims within the scope of ERISA "would pose an obstacle to the purposes and objectives of Congress." 481 U.S. at 52.

It would seem that the United States Supreme Court had said enough on ERISA preemption, but the New Mexico Court of Appeals' opinion and the New Mexico Supreme Court order show otherwise. If other states adopt the New Mexico strategy for preserving a local option to ERISA, there will be no national and uniform regulation of employee welfare benefit plans.

CONCLUSION

In the New Mexico trial court, the Respondent acknowledged he had shunned his ERISA remedy and he justified his non-ERISA negligence action on the grounds that he suspected that an ERISA action against the proper defendants would be fruitless, and therefore, the present suit represented his preferred method for obtaining a collectible award. Whether in this Respondent's instance ERISA provides the optimal solution or the most convenient means for monetary recovery, is no valid legal ground for circumventing a statutory scheme. Whether state courts agree or disagree with the philosophy behind the ERISA legislation, there is no valid basis for ignoring this Court's precedents that § 1144 simply is inconsistent

with and does not permit a local alternative to the ERISA remedy for unpaid plan claims.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By /s/ Mark C. Meiering
Mark C. Meiering
Counsel for Petitioner
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

APPENDIX IA

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

HAROLD SAPPINGTON,
Plaintiff-Appellee,

vs. No. 10,635

JAMES COVINGTON,
Defendant-Appellant. (Filed November 23, 1988)

APPEAL FROM THE DISTRICT COURT
OF LEA COUNTY

R.W. GALLINI, District Judge

JAMES E. TEMPLEMAN
TEMPLEMAN & CRUTCHFIELD
Lovington, New Mexico Attorneys for Plaintiff-Appellee

MARK C. MEIERING
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.
Albuquerque, New Mexico Attorneys for Defendant-Appellant

OPINION

DONNELLY, Chief Judge.

This case involves the issue of whether plaintiff's common law negligence action against defendant insurance agents is barred by federal preemption under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sections 1001 to 1461 (1982). We affirm the trial court's denial of defendant's motion to dismiss.

Plaintiff is an employee of Levy Auto Supply (Levy) of Hobbs. Plaintiff was hospitalized in April 1984 because

of an illness and incurred medical expenses, including hospital and doctor bills, totalling approximately $20,000. Plaintiff alleged he attempted to submit a claim for reimbursement through an insurance plan purportedly obtained by Levy for the benefit of plaintiff and other employees. Plaintiff also alleged that defendant insurance agents, Larry G. Brodie and James Covington, who had arranged the sale of a Mark I Benefits, Inc. (Mark I) group health care plan to plaintiff's employer, "represented . . . that the was fully insured for . . . medical expenses incurred during his hospitalization, [but] the hospitalization insurer, Mark I Benefits, failed to pay" and plaintiff learned later "that such company had never been licensed to do business in the State of New Mexico and that insolvency proceedings had begun against it in the State of Texas."

Plaintiff brought this action against defendants alleging that they negligently failed to determine the status of Mark I and negligently arranged the sale of the health policy to Levy without ascertaining whether the company was solvent and were thereby liable in damages to plaintiff for negligence. Plaintiff also alleged that "[d]efendants knew, or should have known, that Mark I Benefits was not a company in good standing in the State of New Mexico and that harm could result to customers, beneficiaries and third-party beneficiaries of any such insurance contracts sold." After the filing of this action, defendant Brodie died and the remaining defendant, Covington, moved to dismiss or, in the alternative, for summary judgment. We granted defendant's application for interlocutory appeal to review the trial court's denial of the motion.

CLAIM OF PREEMPTION

Defendant asserts that plaintiff's common law negligence claim is barred because 29 U.S.C. Section 1144(a) effectively preempts any action relating to an employee benefit plan expressly provided under ERISA. Defendant argues that the preemptive provision of ERISA precludes a common law action against an insurance agent where the claim involves an employee benefit plan. The issue of whether Congress intended to preempt by federal legislation the area of law embraced within plaintiff's claim is a matter of first impression in New Mexico. Whether preemption exists involves ascertaining the purposes and intent of Congress leading to the enactment of ERISA. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

ERISA "subjects to federal regulation plans providing employees with fringe benefits." *Id.* at 90. It is a wide-ranging statutory scheme whose express purpose is to protect the interests of participants in employee benefit plans by requiring disclosure and reporting of financial and other information to participants, by establishing standards of conduct, responsibility, and obligation for plan fiduciaries, and by providing appropriate remedies and sanctions for breach of the duties set forth in the statute. 29 U.S.C. § 1001(b). A reading of the Act, we think, clearly evinces that Congress intended that ERISA cover and apply to the administration of comprehensive employee benefit plans. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981).

To eliminate the threat posed by conflicting state regulation of employee benefit plans, Congress included in the text of ERISA a broad preemption clause, Section

1144(a), which provides that "[e]xcept as provided in subsection (b) . . . the provisions of this [act] . . . shall supersede any and all State laws insofar as they may now or hereafter *relate to any employee benefit plan. . . .*" (Emphasis added.) In considering to what extent ERISA preempts claims involving employee benefit plans, the United States Supreme Court broadly interpreted the words "relate to" contained in Section 1144. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). The expansive language of Section 1144(a) was deliberately chosen by Congress, *see Shaw*, 463 U.S. at 98-99 & note 18, indicating congressional intent "to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans." "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 96-97 (footnote omitted).

In this case there is no dispute that the health insurance policy defendant sold to Levy would have qualified as an "employee benefit plan" under ERISA. *See* 29 U.S.C. §§ 1002(1) & 1003. Nor is it disputed that if the plan were solvent, plaintiff would be considered a "participant" in such a plan and that his interest in the benefits of the plan would be protected under ERISA. *Compare Totton v. New York Life Ins. Co.*, 682 F.Supp. 731 (D.Conn.1987) (plaintiff's suit against defendant alleging that employer breached employment contracts by wrongful termination ruled not preempted by ERISA); *Schultz v. National Coalition of Hispanic Mental Health & Human Servs. org.*, 678 F.Supp. 936 (D.C.C.1988) (plaintiff's suit seeking in part to recover health, life insurance, and disability benefits

based on the claim, inter alia, that defendants discriminatorily terminated her employment held not preempted under ERISA); *Morningstar v. Meijer, Inc.*, 662 F.Supp. 555 (E.D.Mich.1987) (former employee who sought damages that included the value of future fringe benefits was no longer a "plan participant" and complaint had no direct and distinct relationship to ERISA); *Isaacs v. Group Health, Inc.*, 668 F.Supp. 306 (S.D.N.Y.1987) (court held action not within preemptive provision of ERISA where plan trustees brought suit against fund actuary and computer services provider for breach of contract and negligence); *Greenblatt v. Budd Co.*, 666 F.Supp. 735 (E.D.Pa.1987) (employee's claim that employer tortiously misrepresented that the pension benefits he was receiving would be made equal to those provided under a corporate pension plan, held not preempted under ERISA). *See also Sepanske v. Bendix Corp.*, 147 Mich.App. 819, 384 N.W.2d 54 (1985) (plaintiff's claim against defendant for breach of employment contract not preempted under ERISA even though loss of ability to earn pension benefits was claimed as element of special damages).[1] Equally relevant to our analysis is the fact that defendant does not claim to be a "fiduciary" of Levy's employee benefit plan, for

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[1] Although questioned by different panel of the Michigan Court of Appeals in *Teper v. Park West Galleries, Inc.* 153 Mich.App. 520, 396 N.W.2d 210 (1986), *Sepanske* is discussed with approval in *Morningstar*, 662 F.Supp. at 557, "This court agrees with the rationale expressed in *Sepanske* as more accurately expressing this aspect of federal law. The *Teper* holding is rejected . . . "

which standards of conduct are outlined by ERISA. *See* 29 U.S.C. § § 1001(b) & 1002(21)(A) (defining "fiduciary" under ERISA).

State laws attempting to regulate or administer employee benefit plans which "relate to" ERISA are generally held to be preempted. *E.g., Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 524-25; *Pilot Life Ins. Co. v. Dedeaux* (involving complaint alleging bad faith of insurer in processing insurance claim). But where the state law relied on does not directly intrude upon the area reserved by federal legislation, the state law is not preempted. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. ___, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) (ERISA held not to preempt Maine statute providing for severance payment to employees of company that terminated or moved operation; ERISA preempts state laws relating to employee benefit plans, not laws related to employee benefits). In his complaint plaintiff does not allege negligence in regulating, "directly or indirectly, the terms and conditions of employee benefit plans . . . ." 29 U.S.C. § 1144(c)(2). Instead, the complaint alleges negligence in selecting a licensed and solvent insurance company. Thus, where the state law in question is not designed to affect employee benefit plans directly, our inquiry must focus upon whether the law has an indirect effect on such plans. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 98. Section 1144(a) also preempts state law where the law in question indirectly intrudes into the area of employee benefit plan regulation. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. at 525. In resolving the question raised on appeal, we must therefore compare plaintiff's claim with the area covered by ERISA to determine whether this state law claim

"relates to" an "employee benefit plan" so as to directly, or indirectly, intrude into the area exclusively reserved by the federal legislation. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

Defendant argues that plaintiff's claim is barred because the transaction in which the alleged negligence occured involved the establishment of or "relates to" an employee benefit plan within the meaning of Section 1144(a). We do not believe that Congress intended federal preemption under ERISA to apply where the basis of plaintiff's claim is an alleged negligent failure to provide a valid insurance policy. Instead, we look to the impact that plaintiff's claim may have upon the areas congress intended to be covered by ERISA.

We begin our analysis by observing that ERISA, though clearly broad ranging, does not attempt to set standards for or regulate the conduct of insurance agents involved in acquiring or establishing an employee benefit plan if the agent is not further involved in creation or administration of the plan. Nor does ERISA set standards or attempt to regulate the purchase or sale of insurance policies that, because of the alleged conduct of an agent, never in fact ripen into a ERISA-regulated employee benefit plan. As the Supreme Court observed in *Metropolitan Life*, "laws that regulate only the insurer, or the way in which it may sell insurance, do not 'relate to' [employee] benefit plans" and "would not be preempted. . . ." 471 U.S. at 741. The rationale utilized in *Metropolitan Life* is instructive in the instant case and the absence of any standards or rules of conduct in ERISA for agents through whom insurance policies are sold significantly bears upon our analysis.

Plaintiff's complaint is grounded on a claim of negligence. Plaintiff's claim focuses on the *sale* of an insurance policy that was expected to establish an employee benefit plan wherein he would be a beneficiary. Under these circumstances, the fact that the subject of the transaction about which plaintiff complains was intended to be an ERISA regulated plan is tenuous in nature and does not compel the conclusion that plaintiff's negligence claim is preempted. Here, as asserted in plaintiff's complaint, the alleged negligent conduct of defendant took place before the employee benefit plan was ever acquired or took effect. It is well settled in New Mexico that an insurance agent or broker who undertakes to procure insurance for others and, through his fault or neglect, fails to do so may be held liable for damage resulting therefrom. *Cf. Sanchez v. Martinez*, 99 N.M. 66, 653 P.2d 897 (Ct.App.1982). Similarly it has been held that a third party beneficiary who has suffered damages as a result of appraiser's negligence has standing to sue. *See Stotlar v. Hester*, 92 N.M. 26, 582 P.2d 403 (Ct.App.1978). We do not construe the provisions of ERISA to preempt plaintiff's claim of negligence grounded upon alleged acts or omissions preceding the institution of a benefit plan.

We conclude that the trial judge correctly determined that Congress did not intend to preempt the specific area involved in plaintiff's claim. The relief sought by plaintiff does not affect the administration of any plan, nor is plaintiff's claim of liability against defendant predicated on any right or standard contained in ERISA. Plaintiff's allegation of negligence is grounded upon alleged conduct of the defendant that has no reference to ERISA. *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804

(1986). Moreover, plaintiff's claim for compensatory damages, if successful, would be subject to payment by the defendant and not from ERISA funds. Plaintiff makes no claim for insurance benefits; instead the negligence claim is premised entirely upon allegations of negligent conduct of defendant and Brodie.

Defendant also relies upon two additional arguments. He asserts, and plaintiff concedes, that in lieu of pursuing his claim against defendant, plaintiff has a remedy for recovery of benefits due to him against his employer and against Mark I under ERISA as a "participant" in an employee benefit plan. Defendant contends that because plaintiff's claims is based upon the alleged negligent failure to obtain a viable employee benefit plan, plaintiff is limited to recovery against a potential party named in ERISA under the federal statute's civil enforcement provision and not a direct action against defendant. *See* 29 U.S.C. § 1132(a). We are not persuaded that this alternative is determinative of the preemption analysis in this case.

Where a viable employee benefit plan is created, ERISA's civil enforcement provisions provides the exclusive avenue to plaintiff for recovery of benefits due to him under his employer's medical benefit plan. *See Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987). Similarly, where plaintiff seeks to enforce a right relating to an employee benefit plan, Section 1144(a) constitutes a bar to the action because of the availability of a remedy under Section 1132(a). *See Pilot Life Ins. Co. v. Dedeaux.* However the relief sought by plaintiff herein is not an indirect attempt to regulate an employee benefit plan through a mechanism of state law. Because plaintiff has

charged defendant with negligent misconduct and because the transaction upon which plaintiff's claim is grounded is not regulated under ERISA, we determine that the claim stated in plaintiff's complaint is not preempted by ERISA. The crux of plaintiff's claim is based upon the alleged negligence of defendant in selecting a licensed and solvent insurance company to furnish insurance and does not directly or indirectly relate to the provisions of an employee benefit plan as intended by Congress.

Defendant also argues that because plaintiff has a remedy under Section 1132(a), plaintiff is in effect seeking to recover the value of benefits he would have received under a solvent plan and which his employer would have provided but for defendant's alleged negligence. The relief sought by plaintiff, however, is for compensatory damages arising from the claimed negligence of defendant, not for enforcement of benefits payable under any ERISA plan. The fact that the measure of damages applicable to plaintiff's alleged injury parallels the amount he might otherwise have recovered under a solvent plan does not compel a finding of preemption where an award to plaintiff would have no effect on any employee benefit plan, would not require any change in an existing plan, and where the money for an award to plaintiff would not be paid out of ERISA funds. *See Fort Halifax Packing Co. v. Coyne; Martori Bros. Distribs. v. James-Massengale*, 781 F.2d 1349, *amended* 791 F.2d 799 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986). As observed in *Totton*, although the preemption provisions of ERISA are far ranging in nature, nevertheless, clearly there is a point

beyond which even ERISA was not designed to reach. 682 F.Supp. at 734.

In sum, we conclude that plaintiff's claim does not "relate to any employee benefit plan" but instead constitutes an action in negligence against defendant for failure to provide insurance. Thus, it does not impermissibly intrude into the area preempted or reserved to federal legislation under ERISA. We affirm the trial court's denial of defendant's motion to dismiss.

IT IS SO ORDERED.

/s/ Thomas A. Donnelly
THOMAS A. DONNELLY,
Chief Judge

WE CONCUR:

/s/ A. Joseph Alarid
A. JOSEPH ALARID, Judge

/s/ Rudy S. Apodaca
RUDY S. APODACA, Judge

APPENDIX IB

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

HAROLD SAPPINGTON,

Plaintiff-Respondent,

vs.

JAMES COVINGTON,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI

RODEY, DICKASON, SLOAN, AKIN &
ROBB, P.A.
By: Mark C. Meiering
Attorneys for Petitioner
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

PETITION FOR WRIT OF CERTIORARI

Supreme Court's Jurisdiction:

The court of appeals opinion attached as Exhibit A was filed November 23, 1988. No motion for rehearing is pending. This case came before the court of appeals on an interlocutory appeal.

Questions Presented for Review:

1. Whether ERISA pre-empts Plaintiff's negligence action founded upon nonpayment of benefits by his employee benefits Plan.

a. The federal legislation referred to as ERISA (29 U.S.C. 1001 *et. seq.*) was a comprehensive effort to regulate all aspects of employee benefits plans, and it includes exclusive procedures for resolving employee's disputes relating to nonpayment of plan benefits. Does the court of appeals' decision defeat that purpose?

b. Recent United States Supreme Court cases have held explicitly that all state causes of action for claims relating to employee benefits plans are pre-empted by ERISA's provisions for resolving claims based on nonpayment of benefits. Is the court's opinion in conflict?

c. Does the New Mexico Court of Appeals opinion defeat the pre-emption doctrine, by permitting the Plaintiff to bypass his exclusive ERISA remedy and to seek a non-ERISA remedy for his plan's alleged refusal and failure to reimburse his medical bills?

2. Whether the court of appeals should have followed other federal court cases which applied the pre-emption doctrine to similar theories of claims? For example:

a. *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277 (11th Cir. 1987) (state fraud claim dismissed against broker of plan).

b. *Mid America Hotel Corp. v. Bernstein*, 664 F. Supp. 384 (N.D. Ill. 1987) (no state common law action arising from a plan's insolvency).

3. Whether the court of appeals was justified in using key assumptions which are not warranted conclusions found in the record.

Facts Material to the Questions:

Plaintiff participated in an employee benefits plan provided by his employer, Levy Auto Supply. The Plan was established to reimburse employee's medical bills. Plaintiff admitted this in Response to Requests for Admissions. (ROA 29-30). Nonetheless, the court of appeals' opinion assumes for reasons unclear and not found in the district court record that there was never a ripe employee benefit plan. (Opinion, page 5; see also page 7). From this, the court erroneously reasoned that since there was no ERISA-regulated employee benefit plan, then the ERISA regulatory statute is not involved and the pre-emption doctrine would not bar Plaintiff's non-ERISA common law negligence action.[1]

Plaintiff's Complaint is founded on the allegation that he was employed by Levy Auto, and by virtue of this employment, he was under an employer provided group health plan called Mark I Benefits. (ROA 1, 2). Despite the court of appeals' statements, Plaintiff admitted that there

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[1] Conversely, the opinion, p.7, acknowledged that where there is an actual employee benefit plan, ERISA's civil enforcement provisions provided the exclusive avenue for recovery of benefits. The opinion thereafter proceeds on the basis that if there is no plan, then ERISA pre-emption is not offended by a negligence suit for failure to provide a plan.

was in fact a plan and that he was enrolled in the plan. (ROA 29, Requests No. 4 and 5). He complains that he incurred hospital and medical expenses but was not fully reimbursed by the Mark I Benefits Plan. (ROA 2, 29, 30)

Plaintiff also alleges that he was not paid because the plan became insolvent. He made no direct claim in the insolvency proceeding. (ROA 29) He never proceeded under his ERISA remedies. Instead, he sued the two individuals, Brodie and Covington, who allegedly put this plan in place with the employer, Levy Auto. (ROA 1) The Plaintiff alleges that the Defendants negligently failed to investigate the financial soundness of the Mark I Benefits plan and are liable to the Plaintiff for his unpaid medical expenses. (ROA 2)

It is undisputed by the parties that Plaintiff Sappington's participation in the plan and right to make claims under the plan stem strictly from his enrollment in the Levy Auto employee Mark I Benefit Plan. (ROA 30). It is also undisputed that Plaintiff Sappington has never had any conversations or contact with Defendant Covington and, therefore, Defendant Covington made no personal representations to the Plaintiff. (ROA 29; *But see* Court's Opinion, page 1).

The Basis for Granting the Writ:

1. This is a case of first impression in New Mexico as stated by the court of appeals (Opinion, page 2) and the Application for Interlocutory Appeal.

2. There are no New Mexico Supreme Court decisions on the issue. The United States Supreme Court

recently has issued several significant "Federal Pre-emption" opinions. The New Mexico Court of Appeals' opinion (despite the effort to apply and distinguish the federal rulings) may be in conflict with the controlling United States Supreme Court precedents.

3. There are other cases pending in the trial courts of New Mexico which are or may be controlled by whether the federal legislation (ERISA) is deemed to pre-empt state law causes of action related to employee benefits plans.

4. This case involves a significant question of constitutional law, as well as sub-issues involving the validity of attempting to avoid the pre-emptive effect of Federal legislation by carving out a semantical but not substantive exception to the precedents from the United States Supreme Court. Implicit in the entire analysis is the issue of state-federal comity when state courts are unwilling to accept federal pre-emption in a particular area of law.

5. Not only will the decision in this case guide the district courts in pending cases, this legal issue has substantial public impact because employee benefits plans have become a major fringe benefit in today's economy. Practically every New Mexico family has or will have a benefits claim on an employer's benefit plan. Invariably, there will be disputed claims and the public has a substantial interest in pursuing the correct remedy when resolving those disputes. Because of the magnitude of the issue, the United States Congress established a comprehensive plan for regulating employee benefits plans, including a system of remedies and dispute resolution.

The United States Supreme Court has declared that system paramount and ruled that it supersedes and supplants state remedies or common law causes of action. The New Mexico Court of Appeals' decision carves out an exception whereby a dissatisfied claimant can pursue unpaid plan benefits outside ERISA and despite the federal pre-emption. The court of appeals' "exception" can and will be used to swallow the rule in the sense that it will permit anyone to circumvent ERISA and the intent of Congress. It is difficult to exaggerate the magnitude of the impact on the public because in this modern American economy of pervasive health plans, pension plans and other employee benefits plans, disputes over paid and unpaid plan benefits are inevitable, and a uniform national method for resolving those disputes was intended by Congress.

Argument for Granting the Writ:

The opinion of the court of appeals is well written and on the face seems routinely to dispatch a mundane appeal on a boring issue of unremarkable consequence. The court of appeals cited many of the controlling precedents in journeyman fashion and quoted many of the important principles of law which must be applied and followed. But the effort displayed in the court's opinion does not mean the result is correct or that it is compatible with the acknowledged authorities. Moreover, the consequence of the errors in reasoning is major – even though not immediately apparent from merely reading the opinion – because it ultimately defeats the substance of the statute and the federal precedents.

First of all, the opinion assumes facts which are fundamental to the opinion but which are not valid assumptions and are not justified by the record. To clearly see this, one must back up one step. The opinion quite correctly cites and quotes from Supreme Court cases which hold that Congress intended that ERISA pre-empt the field for federal regulation of employee benefits plans to eliminate inconsistent state and local regulation. State statutory or common law falls in this category if it has a connection with or reference to such a plan. [Opinion, page 3, quoting from *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987).] The opinion goes on to acknowledge from *Shaw* and *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) that a state law claim relates to an employee benefit plan if it directly or *indirectly* intrudes into the area of employee benefit plan regulation.

Against this background it is plain that if this Plaintiff's claim even indirectly relates to a statutorily defined employee benefit plan, he must proceed through his ERISA remedies and the pre-emption doctrine prohibits his common law negligence complaint against this Defendant. But having said this, the court of appeals' opinion immediately jumps the track by shifting to whether it can interpret Congress's legislation under ERISA to be an

attempt to regulate the conduct of insurance agents.[2] Herein arises the faulty assumptions that there was no valid insurance policy and that there was no ERISA-regulated employee benefit plan. From this, the court of appeals ruled that the Defendant's alleged negligence was in failing to produce a viable employee benefit plan, and therefore without an ERISA-regulated plan, and for conduct preceding institution of a benefit plan, there is no ERISA bar to a state negligence action.

This court cannot work from the confused premise of questioning whether there was a plan, or attaching some great temporal importance to whether the alleged negligence occurred before there was a plan. First of all, in this case there was in fact a Mark I Benefits Plan which fell within the statutory definition at § 1002. Plaintiff acknowledged in Answer to Requests for Admissions Numbers 4 and 5 that he was an employee-participant and was enrolled in the Mark I Benefits Plan. His Complaint is that he incurred medical expenses but his plan did not reimburse them because of alleged insolvency proceeding (paragraph 4 of the Complaint). Rather than even try his ERISA remedy against the plan (Request for Admission 2), or sue the plan fiduciary under ERISA, he

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[2] ERISA may not directly single out insurance agents but its entire focus is a uniform regulatory system to insure that the employer's plans and employee's rights under the plans are protected from all angles. An integral part is the regulation of plan operators so that the plan assets are protected. A number of cases have specifically held that state insurance unfair trade practices acts are superseded by ERISA's pre-emption. If ERISA goes this far, then clearly the opinion of the Court of Appeals wrongly states that ERISA cannot be interpreted as an attempt to regulate the conduct of insurance agents. See cases cited by Appellant's Brief pp. 5-6.

sued the individual who brokered the Mark I Benefits Plan to the employer (paragraph 2 of the Complaint). Hence, it is a mystery how the court of appeals could ignore the statutory definition of a regulated plan and concoct its own criteria to conclude that there was no ripened ERISA-regulated plan and there was no viable employee benefit plan within the meaning of ERISA civil enforcement provisions. It is even more perplexing that the opinion assumes (without any supporting legal authority) that there must be an insurance policy before there can be an ERISA plan, and compounds that with the conclusion that Congress did not intend to regulate plans which lack a "valid insurance policy."[3]

The concept that the temporal element is important is also not supported by precedent and is an illogical conclusion. The court of appeals' attaches key importance to the thought that the alleged negligence (failure to investigate the financial status of Mark I Benefits) preceded the institution of the employee benefit plan. The opinion does not explain why "preceding in time" is sufficient to conclude that the allegation of negligence does "not relate" to an ERISA benefit plan. *See Metropolitan Life*, 471 U.8. at 741. On the contrary and regardless of any temporal distinction, this Plaintiff's claim is founded precisely on the alleged failure of an ERISA plan to pay him benefits and is an attempt to collect these benefits in a

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[3] Not only is there no such prerequisite for plan assets, the ERISA legislation specifically contemplates plans without insurance. § 1002(1). And the legislation includes measures to regulate asset management, including governmental oversight. *E.g.*, §§ 1001a(c)(4), 1103 and 1132 (a)(2)

manner outside the ERISA framework. Plaintiff never argued for such a distinction based on time and here again is a key element in the opinion which the parties never briefed.

The opinion fails to mention and is at odds with at least two cases which were cited to the court.

Belasco v. W.K.P. Wilson & Sons, Inc., 833 F.2d 277 (11th Cir. 1987) in part was an attempt to sue the broker of the plan who put it in place with the employer. The court rejected the plaintiff's fraud and bad faith claims against the broker on the grounds of pre-emption. The *Belasco* court certainly did not intimate that suits against brokers are an exception to the exclusivity of ERISA remedies. *Belasco* contradicts the court of appeals' statement "that Congress did not intend to pre-empt the specific area involved in plaintiff's claims." (Opinion Page 6)

Mid America Hotel Corp. v. Bernstein, 664 F. Supp. 384, 386 (N.D. Ill. 1987) involved an allegation that the plan was not financially sound because of the defendants' conduct. The plaintiff coupled ERISA claims with state common law claims. There also was the allegation that the defendants fraudulently induced the establishment of the plan and the plan assets were improperly diminished by the defendants' conduct. The court dismissed the state law claims and permitted only the ERISA action. Neither the allegations of financial insolvency nor the allegation of misconduct "preceding" establishment of the plan were viewed as distinctive issues which validated the right to pursue state law remedies instead of ERISA. In short, the court in *Mid America* did the exact opposite of

the New Mexico Court of Appeals: it held that ERISA pre-emption applied.

Having said why the New Mexico Court of Appeals' Opinion is faulty, it remains to be reiterated what it will mean if it is left uncorrected. By carving out this exception to ERISA preemption, the court permits virtually all claimants to achieve exactly what Congress did not intend and what the United States Supreme Court did not allow in *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987). Any plan participant dissatisfied with the benefits he receives on a specific claim can draft pleadings which will allege negligent conduct which preceded the institution of the benefit plan so as to contend that no "viable" benefit plan exists. By this modest pleading and the court of appeals' decision, every disgruntled plan enrollee will be entitled to circumvent ERISA pre-emption. Moreover, because the court of appeals says that the availability of ERISA remedies is not determinative of pre-emption (Opinion, page 7), the disgruntled plan employee can argue with logic that in New Mexico he can pursue non-ERISA suits right along with claiming his ERISA remedies. Not only will the exception swallow the rule, the result will fly against *Pilot Life* and the other cases cited to the court of appeals: ERISA regulation "would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws." *Id.*, 107 S. Ct. 1549 at 1558.

Conclusion and Prayer for Relief:

Supporting the federal statute and federal precedents is not condoning some unnecessary evil inflicted on New

Mexicans which should be resisted. The ERISA statute is salutary and provides protection for plan beneficiaries. It also provides a different but a real method for handling disputes, and that itself is a relief to state courts. The federal pre-emption doctrine is the means for being certain that the system operates the same regardless of artificial lines on the map. There is nothing bad about any of those objectives and therefore there is no threat to New Mexico's people or courts which must be turned back by finding some theory to thwart the exclusivity of the ERISA remedies.

The supreme court should grant the Petition for Certiorari, and should allow the parties to file briefs which address the court of appeals rationale and how it conflicts with the principle that Congress can establish a national system for overseeing employee benefits plans. That is, New Mexico courts should support, not defeat, a comprehensive system for handling disputes relating to plans without trying to undercut the system with its parallel local remedy. The district court should be reversed.

RODEY, DICKASON, SLOAN, AKIN
& ROBB, P.A.

By /s/ Mark C. Meiering
Mark C. Meiering
Attorneys for Petitioner
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

APPENDIX II

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Tuesday, January 10, 1989

NO. 18,118

JAMES COVINGTON,
Petitioner,

vs.

HAROLD SAPPINGTON,
Respondent.

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 10635 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A True Copy

ROSE MARIE ALDERETE
CLERK OF THE SUPREME COURT

By /s/ Jane Gurulé
Deputy

APPENDIX III

IN THE DISTRICT COURT OF LEA COUNTY

STATE OF NEW MEXICO

HAROLD SAPPINTON,

Plaintiff,

VS

No. CV 85-1014
(Filed September 25, 1985)

LARRY G. "PAT" BRODIE and
JAMES COVINGTON,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff states:

1. Plaintiff is a resident of Lea County, New Mexico and the facts upon which this claim is based occurred in Lea County, New Mexico.

2. At all times relevant to this proceeding, Plaintiff was an employee of Levy Auto Supply of Hobbs, New Mexico, who had purchased a policy of health insurance on its employees from Mark I Benefits which had been sold to Plaintiff's employer by Defendants, or either of them.

3. On or about April 9, 1984, Plaintiff had occasion to be hospitalized at Lea Regional Hospital which hospitalization continued until on or about April 24, 1984. During this period of time, Plaintiff accumulated medical expenses, including hospitalization and doctor bills, totally approximately $20,000.

4. Although Defendants represented to Plaintiff or his employer that he was fully insured for such medical expenses as he incurred during his hospitalization, the hospitalization insurer, Mark I Benefits, failed to pay when requested to do so. Plaintiff later learned that such company had never been licensed to do business in the State of New Mexico and that insolvency proceedings had begun against it in the State of Texas.

5. Defendants knew, or should have known, that Mark I Benefits was not a company in good standing in the State of New Mexico and that harm could result to customers, beneficiaries and third-party beneficiaries of any such insurance contracts sold.

6. Defendants were negligent in failing to investigate the status of Mark I Benefits to determine whether or not it was in good standing in the State of New Mexico, whether or not it was financially stable and in continuing to sell such insurance without having knowledge as to the companies standing or financial condition. Due to Defendant's negligence, Plaintiff has been damaged in the sum of $20,000.

WHEREFORE, Plaintiff prays damages against the Defendants in the sum of $20,000, for its costs, attorney's

fees and for such other relief as the Court may deem just and proper.

TEMPLEMAN AND CRUTCHFIELD
Second Floor, Reed McCrory Building
Lovington, New Mexico 88260
(505) 396-4927

By: /s/ James E. Templeman
JAMES E. TEMPLEMAN,
Attorney for
Plaintiffs

APPENDIX IV

FIFTH JUDICIAL DISTRICT COURT
COUNTY OF LEA
STATE OF NEW MEXICO

HAROLD SAPPINGTON,

Plaintiff,

VS.

NO. CV 85-1014
(Filed March 4, 1988)

LARRY G. "PAT" BRODIE
and
JAMES COVINGTON,

Defendants.

RESPONSE TO
REQUESTS FOR ADMISSIONS

COMES NOW the Defendant, James Covington, and pursuant to the Rules of Civil Procedure, propounds the following Requests for Admission to the Plaintiff, Harold Sappington:

REQUEST NO. 1: Plaintiff Harold Sappington has had no conversations or direct dealings with Defendant James Covington.

Admitted

REQUEST NO. 2: Plaintiff Harold Sappington has not appeared in any bankruptcy or insolvency proceeding involving Mark I Benefits for the purpose of making a claim on the assets of Mark I Benefits.

Admitted

REQUEST NO. 3: Plaintiff Harold Sappington was entitled to participate in the Mark I Benefits plan because of the Plaintiff's employment with Levy Auto Supply of Hobbs, New Mexico.

My employer said I was.

REQUEST NO. 4: At the time when Plaintiff Harold Sappington incurred the medical and hospital expenses for which he makes a claim in the Complaint in the above captioned cause, he was an employee of Levy Auto Supply and was enrolled in the Mark I Benefits plan because of that employment.

I was so employed and was told I was so enrolled.

REQUEST NO. 5: The Plaintiff Harold Sappington was first employed by Levy Auto Supply prior to the date when the Mark I benefits plan was accepted and placed into effect by Levy Auto Supply.

Admitted.

INTERROGATORIES

Pursuant to the rules of Civil Procedure, Defendant James Covington propounds the following Interrogatories to be answered fully in writing by the Plaintiff within 30 days:

Interrogatory No. 1: If you deny any of the above Requests for Admission, then for each numbered request for admission, state the complete facts within your knowledge or that of your representative which forms the basis or reasons for your denial of the request for admission.

Answer: N/A

Interrogatory No. 2: If you have any documents or tangible items which you rely upon as grounds for

denying any of the Requests for Admission, please identify the specific document you rely upon, and state the content of each document, as well as the name and address of the person in possession of each document.

Answer: N/A

HAROLD SAPPINGTON

TEMPLEMAN AND CRUTCHFIELD
2nd Floor, Reed McCrory Building
Lovington, New Mexico 88260
(505) 396-4927

By: /s/ James E. Templeman
JAMES E. TEMPLEMAN
Attorneys for Plaintiff

STATE OF)
SS:
COUNTY OF)

Harold Sappington, being first duly sworn upon oath states: I have read and answered the foregoing instrument, know and understand the contents thereof and state that the matters and things therein stated are true and correct to the best of my knowledge, information and belief.

/s/ Harold Sappington
HAROLD SAPPINGTON

SUBSCRIBED AND SWORN TO before me this 26th day of February, 1988.

/s/ Jo Addison
NOTARY PUBLIC

My Commission Expires:
5-15-89